No. 18-726

In The
Supreme Court of the United States

LINDA H. LAMONE, *et al.*,

Appellants,

v.

O. JOHN BENISEK, *et al.*,

Appellees.

On Appeal from the United States District Court for the District of Maryland

BRIEF OPPOSING MOTION TO AFFIRM

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This Court should note jurisdiction and deny plaintiffs' motion to affirm, which advocates a standard different from those stated below in either of the three-judge court's competing majority opinions. Granting the motion would only exacerbate the uncertainty created by the three-judge court.

ARGUMENT

I. The Motion Should Be Denied Because it Seeks Affirmance of a Partisan Gerrymandering Standard That Differs from the Three-Judge Court's.

Plaintiffs ask this Court to affirm based on a flawed standard that was not articulated by the court below. Plaintiffs' abandonment, in several critical respects, of the decisions below shows that not even they believe the lower court's rulings should be the last word on the subject. This alone counsels denial of the plaintiffs' motion.

In maintaining that their First Amendment retaliation claims are justiciable, plaintiffs focus on the three-judge court's burden element: plaintiffs must "show that the redistricting plan burdened them in a practical way." Motion to Affirm 18. In this element's defense, plaintiffs jettison the lower court's analysis in favor of importing the test for vote dilution developed under § 2 of the Voting Rights Act, a test absent from the opinions below. *Compare id.* at 18-20 (citing, *inter*

alia, *Thornburg v. Gingles*, 478 U.S. 30, 46 (1986)), *with* J.S. App. 31a-43a, 48a-56a, 67a-76a.

Whereas Judge Niemeyer's "burden" discussion invokes generalities, such as "*electoral effectiveness—i.e., . . . opportunity to elect a candidate of choice*," J.S. App. 52a, without defining what that showing entails, plaintiffs propose a different test that features numerical standards. Motion to Affirm 19. Whatever the merits of the plaintiffs' proposed test, it is not the approach taken by the lower court.

Similarly, plaintiffs purport to embrace this Court's precedents acknowledging that some consideration of political affiliation in redistricting is permissible. *See* Motion to Affirm 23-24. But plaintiffs' nod to precedent is contradicted by the three-judge court's judgment requiring the State to redraw the boundaries of the Sixth District "without considering how citizens are registered to vote or have voted in the past or to what political party they belong," App. 79a. *See Satterlee v. Matthewson*, 27 U.S. 380, 410 (1829) ("[I]t is *the judgment* of [the lower] court * * * and not the *reasoning of the judges* upon it, which this Court is now called upon to revise."). Plaintiffs also argue that a redistricting plan adhering to this Court's precedents upholding the consideration of political affiliation in certain circumstances "would almost surely pass strict scrutiny." Motion to Affirm 23. Plaintiffs' resort to strict scrutiny analysis would itself place their standard in tension with this Court's precedent. *Vieth v. Jubelirer*, 541 U.S. 267, 285-86 (2004) (plurality op.). But even aside from that difficulty, plaintiffs' argument goes beyond the

three-judge court's analyses, which do not address the level of scrutiny.

Plaintiffs also deny that the practical effect of the lower court's standard would be to "[e]nshrin[e] pre-existing" and often gerrymandered maps "as the constitutional touchstone for future redistricting." *See* Motion to Affirm 25. But here, too, plaintiffs stray far afield from the three-judge court's reasoning. They argue that the benchmark for evaluating the gerrymander "is not the immediately prior district" but rather "the full range of hypothetical districts that could have been drawn in the area." *Id.* But the lower court said nothing of the sort. Instead, Judge Niemeyer's opinion purported to compare the new district to the old in ways that bear upon both voters' representational rights (J.S. App. 53a-54a) and their associational rights (J.S. App. 61a-63a). So, too, did Judge Bredar's opinion. J.S. App. 73a-75a.

If nothing else, these differences separating the plaintiffs from the three-judge court's decision demonstrate why granting their motion would deprive Maryland of the clarity its legislature needs, if future redistricting plans are to have any hope of satisfying the applicable standard, whatever that standard may be. Granting summary affirmance of the divided three-judge court will not supply the needed guidance. Given this Court's recognition that "[a]scertaining the reach and content of summary actions may itself present issues of real substance," *Hicks v. Miranda*, 422 U.S. 332, 345 n.14 (1975), the problems such a disposition would

engender weigh heavily in favor of denying the motion and noting jurisdiction.

II. Plaintiffs' Arguments for Affirmance Raise Multiple Unresolved Issues That Are Ill-Suited for Summary Disposition.

A. The Lower Court's Standard Extends First Amendment Retaliation Doctrine to Legislative Activity.

As the Tenth Circuit has observed, no precedent of this Court expands the prohibition of "adverse discretionary executive action [that] was motivated by the plaintiff's speech or association—to legislative enactments." *Planned Parenthood of Kan. & Mid-Mo. v. Moser*, 747 F.3d 814, 840 (10th Cir. 2014), *abrogated in part on other grounds by Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1383 (2015). Moreover, courts of appeals have rejected First Amendment challenges alleging burdens on speech or association due to facially constitutional legislation if, as in the case of retaliation, the claims require inquiry into governmental motivation. *In re Hubbard*, 803 F.3d 1298, 1313 (11th Cir. 2015) (stating such challenges do "not present[ ] a cognizable First Amendment claim"); *see also Moser*, 747 F.3d at 842; *Bailey v. Callaghan*, 715 F.3d 956, 960 (6th Cir. 2013); *Kensington Volunteer Fire Dep't, Inc. v. Montgomery County*, 684 F.3d 462, 467-70 (4th Cir. 2012); *Southern Christian Leadership Conf. v. Supreme Ct. of La.*, 252 F.3d 781, 795 (5th Cir. 2001); *Hearne v. Board of Educ. of City of Chicago*, 185 F.3d

770, 775 (7th Cir. 1999); *South Carolina Educ. Ass'n v. Campbell*, 883 F.2d 1251, 1257-59 (4th Cir. 1989).

Both groups and individuals often find themselves frustrated in their legislative efforts and, consequently, they are subject to policies and statutes that indirectly burden their expression or association, like restrictions on student practice of law, *Southern Christian Leadership Conf.*, 252 F.3d at 784, or laws reducing labor protections for teachers, *Hearne*, 185 F.3d at 773. But this Court has consistently rejected challenges where plaintiffs allege only indirect burdens on their First Amendment rights, even where no motivation inquiry is required. *Christian Legal Soc. Chapter of the Univ. of California, Hastings Coll. of the Law v. Martinez*, 561 U.S. 661, 695 (2010); *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 763 (1994); *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

Adding an inquiry into legislative motive further complicates matters. The implications of expanding "statutory-motive cases to the arena of freedom of speech and association" are "daunting." *Moser*, 747 F.3d at 842. It is too easy for potential plaintiffs to allege that a facially neutral statute "becomes constitutionally defective because one of the reasons the legislators voted for it was to punish those who opposed them during an election campaign." *Hearne*, 185 F.3d at 775. Courts are ill-suited to decide, in every contested legislative process, "whether legislators were motivated to punish" an association advocating for legislation, "or were opposed" to the policy position of the association, "or were simply in favor" of the specific

legislative proposal under consideration. *Moser*, 747 F.3d at 843.

Here, the three-judge court's standards are based on a First Amendment retaliation cause of action, J.S. App. 42a-43a, that has never been extended to legislative activity. It requires inquiry into legislative motive, J.S. App. 43a, and an evaluation of indirect burdens on plaintiffs' asserted rights, *id.* These concepts are not "well developed and familiar," *Baker*, 369 U.S. at 226, because courts have declined to apply them to statutes and legislative action. Any endorsement of importing these concepts into the legislative sphere would, at minimum, require plenary review.

B. Plaintiffs' Unreasonable Delay Precludes Injunctive Relief.

Plaintiffs seek to relitigate this Court's prior unanimous conclusion that "years-long delay" in this case "largely arose from a circumstance within plaintiffs' control." *Benisek*, 138 S. Ct. at 1944. Plaintiffs rely on the three-judge court's contrary finding on remand that it has "not seen any dilatory effects . . . either by the plaintiffs or by the State," App. 66a, but that finding contravenes this Court's law-of-the-case doctrine and, therefore, constitutes an abuse of discretion. *See In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255 (1895).

Plaintiffs also assert that "Courts regularly enter injunctive relief late in a redistricting cycle," Motion to Affirm 32, but for that proposition plaintiffs cite only

one example, *Perez v. Abbott*, 267 F. Supp. 3d 750 (W.D. Tex. 2017), a case that did not involve a record of "plaintiffs' unnecessary, years-long delay," *Benisek*, 138 U.S. at 1944. Instead, *Perez* was the product of a complex history beyond plaintiffs' control and ended in this Court reversing the majority of the district court's injunction. *Abbott v. Perez*, 138 S. Ct. 2305, 2315-19 (2018) (discussing complex procedural and legislative history). That history is far from typical or "regular," and contrasts starkly with Maryland's history in the same period, throughout which the legislature's 2011 Congressional plan has been in effect, having withstood multiple legal challenges, including *Fletcher v. Lamone*, 831 F. Supp. 2d 887 (D. Md. 2011), *aff'd*, 567 U.S. 930 (2012).

Even if the injunction ordered in *Perez v. Abbott* had not been reversed, it would still be distinguishable from the injunction issued below. In *Perez*, the court ordered relief three years before the decennial census and in time to complete redrawing of the map before the third election conducted under the challenged plan. 138 S. Ct. at 2335. Here, the court below issued its injunction less than two years before the next census and after four elections had already occurred under the 2011 plan. As explained in the jurisdictional statement, the combination of plaintiffs' delay and the closeness of the next reapportionment threatens disruption of the electoral process and renders the injunction an abuse of discretion.

III. The Three-Judge Court Erred by Departing from the Summary Judgment Standard.

The Court should also reject plaintiffs' suggestion that this appeal should be exempt from the summary judgment requirements that necessitated reversal of a three-judge court in *Hunt v. Cromartie*, 526 U.S. 541 (1999). Though *Hunt* involved claims of racial rather than partisan gerrymandering, the pertinent parts of its holding apply here and cannot be distinguished away.

First, though plaintiffs make much of the parties' filing of cross-motions for summary judgment asserting an absence of disputed facts, *Hunt* also came to this Court from a ruling on cross-motions for summary judgment. *Id.* at 545 ("The parties filed competing motions for summary judgment and supporting materials[.]"). Like the decision below, the three-judge court's decision in *Hunt* purported to rely on "uncontroverted material facts," *id.*, but that assurance did not dissuade this Court from noting jurisdiction and then reversing for failure to heed the summary judgment standard. As federal appellate courts have repeatedly explained, "[t]he ordinary standards for summary judgment remain unchanged on cross-motions for summary judgment:" a court must do what the court below failed to do, which is "construe all facts and inferences arising from them in favor of the party against whom the motion under consideration is made." *Blow v. Bijora, Inc.*, 855 F.3d 793, 797 (7th Cir. 2017); *accord Auto-Owners Ins. Co. v. Stevens & Ricci, Inc.*, 835 F.3d 388, 402 (3d Cir. 2016); *Craig v. Bridges*

Bros. Trucking LLC, 823 F.3d 382, 387 (6th Cir. 2016). The filing of cross-motions does not mean that "there are no genuine issues." *Hot Stuff Foods, LLC v. Houston Cas. Co.*, 771 F.3d 1071, 1076 (8th Cir. 2014) (citation omitted).

The plaintiffs also try to distinguish *Hunt* because the parties there did not pursue discovery, but the lack of discovery did not feature in this Court's analysis or disposition. 526 U.S. at 554. Instead, *Hunt* applied the summary judgment standard explained in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), cases that involved motions for summary judgment "[f]ollowing discovery," *id.* at 245; *see Celotex*, 477 U.S. at 326. *See also Georgia State Conf. of NAACP v. Fayette County Bd. of Comm'rs*, 775 F.3d 1336, 1346 (11th Cir. 2015) (on cross-motions for summary judgment, reversing for impermissible weighing of evidence where "discovery was completed").

The plaintiffs further identify the lack of "direct evidence of intent" in *Hunt*'s record, 526 U.S. at 549, but the court below relied on post-hoc statements of intent, J.S. App. 49a-50a; statements of legislators uninvolved with map drafting, J.S. App. 20a-24a, and opponents of the legislation, J.S. App. 24a, and, moreover, omitted consideration of the intent of the Maryland voters who approved it at referendum. Dkt. 104 ¶39. Even as to those statements, *Hunt* precludes summary judgment "in favor of the party with the burden of persuasion," *id.* at 553, because "'all justifiable inferences are to be drawn in [defendants'] favor.'" *Id.* at

552 (citation omitted). For "'[s]ummary judgment may be inappropriate even where the parties agree on the basic facts,'" such as words someone uttered, "'but disagree about the inferences that should be drawn from these facts.'" *NAACP*, 775 F.3d at 1347 (citation omitted).

Like the summary judgment decisions reversed in *Hunt* and *NAACP*, the decision below does not reflect "inferences drawn in Appellants' favor." *Id.*, 775 F.3d at 1347. Notwithstanding plaintiffs' characterization, the three-judge court did not accept "as true" and fully "believe[ ]," *Hunt*, 526 U.S. at 551, 552, the State's legitimate legislative decisions that resulted in the Sixth District's boundaries. If the court had credited defendants' justification, it would have at least acknowledged evidence that, after accounting for changes to the Sixth District's boundaries necessitated by redrawing of districts not challenged here—the First and Fourth Districts—the net combined number of registered Republicans and Democrats reassigned in and out of the Sixth District was insufficient to account for the 2012 Congressional election result. Dkt. 177-19, 13; Dkt. 186-31, 2. Instead of accepting this evidence as true and probative, the court assailed the "utter implausibility" of defendants' evidence. J.S. App. 55a.

Moreover, a court cannot forgo ruling on evidentiary objections and, nonetheless, treat challenged evidence as "undisputed." "Before ordering summary judgment in a case, a district court . . . must also rule on evidentiary objections that are material to its

ruling." *Norse v. City of Santa Cruz*, 629 F.3d 966, 973 (9th Cir. 2010). The failure to do so constitutes reversible error if "not harmless," including where the failure to address objections leaves the parties "confused on precisely what constitutes the actual record" and causes them to "dispute what evidence [the appellate court] should actually consider."[1] *Id.* at 974; *accord Ambat v. City & County of San Francisco*, 757 F.3d 1017, 1032 (9th Cir. 2014) (failure to resolve objections harmless only due to reversal and remand).

Finally, contrary to plaintiffs' notion that it is somehow "debatable" whether the district court's decision could be understood as "a judgment following submission on the papers," Motion to Affirm 28 n.3, applicable precedent removes any doubt. In reviewing an appeal from disposition of cross-motions for summary judgment, the Court has emphasized that it "must assess the record under the standard set forth in Rule 56 of the Federal Rules of Civil Procedure." *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 883-84 (1990); *see id.* at 900 (Blackmun, J., dissenting) (referencing "the parties' cross-motions for summary judgment"). This assessment is de novo. *Eastman Kodak Co. v. Image Tech.*, 504 U.S. 451, 466 n.10 (1992).

As plaintiffs note, some courts have held that on cross-motions for summary judgment, if the parties

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[1] *Campbell v. Shinseki*, 546 F. App'x 874, 879 (11th Cir. 2013), cited by plaintiffs, is an unpublished decision that lacks precedential value under 11th Circuit Rule 36-2, and is unpersuasive because none of the cases it cites involved evidentiary objections on motions for summary judgment.

stipulated to all facts, or one party "gave no indication" that "any additional evidence . . . existed" other than the "conceded facts" asserted in the opponent's motion for summary judgment, then the appellate court may engage in "clear-error review." *E.E.O.C. v. Steamship Clerks Union, Local 1066*, 48 F.3d 594, 603 (1st Cir. 1995) (citations omitted). But "[w]hen determining whether this was the path taken by the parties," the appellate court must "inquire into the intentions of the parties and the district court judge, as evidenced by the record on appeal." *Garcia-Ayala v. Lederle Parenterals, Inc.*, 212 F.3d 638, 644 (1st Cir. 2000).

Here the record discloses no intention to treat the cross-motions for summary judgment as a "case stated" tantamount to a bench trial on the papers.

The parties briefed the cross-motions as summary judgment motions and, though they entered a short stipulation of facts, Dkt. 104, the parties also submitted voluminous separate evidence, much of it contested. That circumstance alone disqualifies this matter for "case stated" treatment. *See, e.g.*, *NAACP*, 775 F.3d at 1345.

As for the three-judge court, it gave no hint that it intended to treat cross-motions as a case submitted for trial on the papers. The scheduling order recited that "[p]ending before the Court" was each party's "motion for summary judgment" as to which "the parties may present oral argument." Dkt. 213. At oral argument, Judge Niemeyer made repeated reference to the

summary judgment standard. Dkt. 221, Tr. 2:2-9, 20:4-15, 52:2-16.

Thus, contrary to plaintiffs' contention, this record provides no basis for exempting the parties' cross-motions for summary judgment from the requirements of Rule 56.

CONCLUSION

The motion to affirm should be denied.

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